86-597

No. _____

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1986

UNION GAS COMPANY, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED

Is the Eleventh Amendment a bar to suit against a state pursuant to a Federal statute which expressly defines a "person" subject to suit to include a state?

## PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were as follows:

| | |
|---|---|
| Appellant: | Union Gas Company |
| Appellee: | Commonwealth of Pennsylvania |

## STATEMENT OF PARTIES AFFILIATED WITH PETITIONER

The following are parent, subsidiary or affiliate companies of petitioner Union Gas Company:

Penn Fuel System, Inc.
North Penn Gas Company
Penn Fuel Gas, Inc.
Gas Oil Products, Inc.
Gas Oil Products Inc. of Delaware
Allied Gas Company
Central Penn Gas Company
Counties Gas Company
Interborough Gas Company
Lewistown Gas Company
South Penn Gas Company

## TABLE OF CONTENTS


| | Page |
|---|---|
| CITATIONS TO OPINIONS | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 5 |
| CONCLUSION | 12 |
| APPENDIX | |
| App. A: Third Circuit Opinion, June 10, 1986 | A-1 |
| App. B: District Court Opinion dismissing Petitioner's Third-Party Complaint, November 17, 1983 | A-35 |
| App. C: District Court Order dismissing Petitioner's Amended Third-Party Complaint, September 13, 1984 | A-45 |
| App. D: Justice Brennan's Order extending the time for filing this Petition, August 27, 1986 | A-47 |

## TABLE OF AUTHORITIES


| *CASES* | Page |
|---|---|
| *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 12 (1983) | 6 |
| *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142, 3148, 3149 (1985) | 6, 7, 9 |
| *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1983) | 6 |
| *David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985) | 7 |
| *Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 285 (1972) | 8 |
| *Exxon Corporation v. Hunt*, 106 S.Ct. 1103, 1112-13 (1986) | 5 |
| *Hans v. Louisiana*, 134 U.S. 1 (1980) | 9 |
| *Hutto v. Finney*, 437 U.S. 678, 706 (1978) | 7, 9 |
| *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S.Ct. 755, 762 (1986) | 5 |
| *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2nd Cir. 1985) | 11 |

| *OTHER AUTHORITIES* | |
|---|---|
| United States Constitution, Amendment XI | 2 |
| United States Code | |
| 29 U.S.C. §794 | 6 |
| 33 U.S.C. §1251 *et seq.* | 5 |
| 33 U.S.C. §§1321(b)(3) and (f)(2) | 4 |
| 33 U.S.C. §1365 | 5 |
| 42 U.S.C. §1988 | 7 |
| 42 U.S.C. §3251 *et seq.* | 5 |
| 42 U.S.C. §6967 | 5 |
| 42 U.S.C. §7401 *et seq.* | 5 |

TABLE OF AUTHORITIES—*(Continued)*

*OTHER AUTHORITIES*


| | Page |
|---|---|
| 42 U.S.C. §7604 | 5 |
| 42 U.S.C. §9601(20)(A) | 4 |
| 42 U.S.C. §9601(21) | 2 |
| 42 U.S.C. §9604(c)(3) | 10 |
| 42 U.S.C. §9607(a) | 2, 3 |
| 42 U.S.C. §9612(a) | 10 |

# In the Supreme Court of the United States

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No. _____

UNION GAS COMPANY, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

## CITATIONS TO OPINIONS

The Opinion of the United States Court of Appeals for the Third Circuit, which appears in the Appendix, is reported at 792 F.2d 372 (1986). The Opinion of the United States District Court for the Eastern District of Pennsylvania dismissing the third party complaint as to the Commonwealth, which also appears in the Appendix, is reported at 575 F.Supp. 949 (1983). That Court's order dismissing the amended third party complaint as to the Commonwealth is in the Appendix but is not reported.

## JURISDICTION

The judgment of the Court of Appeals (App. at A-1) was entered on June 10, 1986. On August 27, 1986, Justice Brennan extended the time for filing this petition to October 8, 1986 (App. at A-47). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(i).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment XI:

"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

2. United States Code, 42 U.S.C. §§9601(21) and 9607(a), P.L. No. 96-510, 94 Stat. 2767 [Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980 ("CERCLA")]:

9601(21) " 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State or any interstate body;"

9607(a) ". . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . ."

## STATEMENT OF THE CASE

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act in 1980 to secure the prompt cleanup of the nation's pollution sites on a comprehensive basis. CERCLA's purpose is to obtain voluntary compliance with cleanup objectives and, failing that, to authorize the United States Environmental Protection Agency ("EPA") to accomplish the cleanup. Initial funding to the EPA or private parties is available through Superfund for certain sites. Importantly, CERCLA imposes retroactive strict liability on all owners and

operators of pollution sites without exception as to their private or governmental status. 42 U.S.C. §9607(a).

This case raises a question of central importance in the administration of CERCLA—whether a private person who has paid the costs of cleaning up a designated pollution site for which a state is partially responsible may recover contribution from the state under the strict liability provisions of the statute. Under the facts as alleged in petitioner's third party complaint, the State of Pennsylvania was an owner and operator of a portion of the Stroudsburg, Pennsylvania pollution site. Although the statute specifically defines a "person" subject to suit under CERCLA as including a "State," the courts below held respondent Commonwealth of Pennsylvania immune from suit under the Eleventh Amendment.

The sudden release of coal tar into Brodhead Creek in Stroudsburg, Pennsylvania in October 1980 caused the United States to declare the site the nation's first emergency Superfund site. Adjacent to the stream from 1890 to 1948 in an industrial section of Stroudsburg had been a carburetted water gas plant which produced coal gas as well as its by-product, coal tar. The EPA regarded in-ground disposal of coal tar as state of the art technology during the first part of this century (see EPA Amended Fund Authorization Report). The company operating the plant changed ownership several times before being merged into petitioner in 1978. The plant was dismantled in 1948 and replaced successively by propane and natural gas distribution systems.

Between 1960 and 1962 the State rechanneled, narrowed and deepened Brodhead Creek and erected a dike on its sides. The Borough and later the State obtained a permanent easement or fee title to much of the site. The rechannelization of this fast flowing stream started a process of downcutting of the stream bank and erosion of the toe of the dike that led to the release of coal tar. It was during repairs to the toe of the dike that coal tar was first discovered. Between April 1981 and January 1982, the United States did a cleanup of the site at an alleged expense of $967,000.00.

The United States commenced this lawsuit on May 23, 1983

in the United States District Court for the Eastern District of Pennsylvania to recover its cleanup costs pursuant to CERCLA and the Clean Water Act, 33 U.S.C. §§1321(b)(3) and (f)(2), naming petitioner as the sole defendant. Petitioner filed a third-party complaint naming the Commonwealth of Pennsylvania and the Borough of Stroudsburg as third party defendants alleging that they were owners and operators of a facility at the site within the meaning of CERCLA, 42 U.S.C. §9601(20)(A), and, together with others, negligently caused or contributed to the release of coal tar.

The State moved to dismiss the Third party complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) alleging that it was immune to suit under CERCLA pursuant to the Eleventh Amendment to the Constitution. The district court granted the State's motion (App. at A-35). Thereafter, the United States filed an amended complaint revising its damage claim, and petitioner filed an amended third-party complaint. The State again moved to dismiss, and the district court granted the motion for the reasons set forth in its earlier opinion. (App. at A-45)

As the result of a settlement reached among the United States, petitioner and the Borough of Stroudsburg whereby petitioner paid a major portion of the cost of cleanup, the district Court dismissed the action. Petitioner then appealed the district court's dismissal of the State as a defendant to the United States court of Appeals for the Third Circuit. A two member majority of the Third Circuit affirmed the district Court's order reasoning that the language of the statute was sufficiently clear and finding a lack of "overwhelming evidence of congressional intent" to abrogate the State's immunity.

The Honorable A. Leon Higginbotham filed a vigorous dissent, accusing the majority of disregarding CERCLA's explicit language by "assum[ing] that judges have a better mastery and understanding of the English language than does Congress" and "roam[ing] through inconclusive legislative history to 'demonstrate' that Congress did not mean state when they included that specific phrase in the key definitional section of the statute." (App. at A-22) Finding no ambiguity in CERCLA's language and no contrary legislative intent, Judge Higginbotham would have

held that the statute clearly abrogated states' Eleventh Amendment immunity. (App. at A-30)

## REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

### I

### This Case Raises An Important Issue As To The Standard For Interpreting A Statute Under The Eleventh Amendment

Prior to passing CERCLA in December 1980, Congress approved three piecemeal attempts to clean up pollution sites: the Clean Air Act, the Clean Water Act and the Resource Conservation and Recovery Act. 42 U.S.C. §7401 *et seq.*; 33 U.S.C. §1251 *et seq.*; 42 U.S.C. §3251 *et seq.* This statutory patchwork quilt neither separately nor together gave focus or muscle to a national cleanup policy. Importantly, each specifically preserved the states' Eleventh Amendment immunity. See 42 U.S.C. §7604; 33 U.S.C. §1365; 42 U.S.C. §6967.

CERCLA, with its retroactive strict liability and elimination of minimum quantities of disposed pollutants, represented a radical departure from prior law. CERCLA was intended as a comprehensive approach to the cleanup of the nation's pollution sites amid congressional apprehension of a pollution crisis. See *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S.Ct. 755, 762 (1986). While Congress was divided as to the contents of such a comprehensive law, *Exxon Corporation v. Hunt*, 106 S.Ct. 1103, 1112-13 (1986), there was never any dispute that the law should apply to governmental entities. The final version included "United States Government, *State*, municipality, commission, political subdivision of a State or any interstate body" (emphasis added) in the definition of a "person" who could be sued. The United States' own abandonment of sovereign immunity in a statute imposing strict liability is a gauge of the extent of the congressional commitment that no one should be immune.

The language of CERCLA explicitly and unambiguously authorizes suits against states, thereby abrogating states' Elev-

enth Amendment immunity. The term "person" is defined in the statute to include a "state," and a "person" may sue or be sued for the recoupment of cleanup costs. Where statutory language is clear and unambiguous, and there are no "clearly expressed legislative intentions to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1983). A court need not and will not look behind a statute's plain, unambiguous language to interpret it. *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 12 (1983).

Despite what appeared to be a clear statutory definition of the persons liable under the statute, the courts below held that Congress had not intended to compel a waiver of the states' Eleventh Amendment immunity. The Third Circuit conceded that there was no legislative history at all dealing with the Eleventh Amendment issue. Thus, as the dissent points out, this case raises a basic question of Eleventh Amendment jurisprudence: whether Congress may evidence its intent to make states liable to Federal suit through a standard legislative means—defining states as persons subject to liability—or must make some further statement or create some additional legislative history in order to confirm its intent.

The Third Circuit's holding that there must be "overwhelming evidence of congressional intent" to abrogate state immunity, is inconsistent with this Court's decision in *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142 (1985). The plaintiff in *Atascadero* sought money damages from a state hospital under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1982), which gave a cause of action against "any recipient of federal assistance." This Court held that such a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero*, 105 S.Ct. at 3149. In contrast to the Rehabilitation Act of 1973, CERCLA's permission to sue "persons," defined to include states, was not a general authorization but rather the unequivocal authority this Court found wanting in *Atascadero*.

The omission of congressional debate as to abrogation of state immunity is superfluous where the statute itself is explicit.

Certainly there is nothing in *Atascadero* which requires Congress to explain in its debates and reports that which Congress has made explicit in a statute. Quite the contrary, *Atascadero* requires that Congress make its intent clear "in the language of the statute itself." 105 S.Ct. at 3148.

The Third Circuit was evidently led astray by the tension between *Atascadero* and *Hutto v. Finney*, 437 U.S. 678 (1978). At issue in *Hutto* was whether the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, abrogated states' Eleventh Amendment immunity where the act did not even refer to states in its language. The Court held there was abrogation because of the overwhelming evidence of legislative intent gleaned from the Act's purpose and history; four dissenting Justices argued that "we should not permit items of legislative history to substitute for explicit statutory language." 437 U.S. at 706. In *Atascadero*, however, the majority looked solely to the language of the statute itself and did not even mention the legislative history.

The Third Circuit seems to have resolved this tension by concluding that the Eleventh Amendment may only be waived when Congress provides both explicit statutory language *and* overwhelming legislative history. This is plainly error. As Judge Higginbotham pointed out in dissent, "in matters of statutory construction of legislation that is as explicit as the statute in issue, no other court has imposed as broad a reading of eleventh amendment prohibitions." (App. A at page 22).

More importantly, the Third Circuit's opinion illustrates the divergent approaches taken by the lower courts in reconciling *Atascadero* and *Hutto*. At the other end of the pole are cases such as *David D. v. Dartmouth School Committee*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 54 U.S.L.W. 3716 (1986), in which the First Circuit held that the *Atascadero* standard could be met by a combination of legislative history, a reference in the preamble to "equal protection of the laws," and the structure of the statute. In light of the confusion engendered by prior decisions, this case provides a logical opportunity to clarify the respective roles of language and legislative history in effectuating a waiver of the states' immunity.

The result in this case is not controlled by this Court's decision in *Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1972). *Employees* involved a suit by a state hospital employee to recover wages under the Fair Labor Standards Act. As enacted in 1938, the FLSA made employers liable to employees for double damages for unpaid minimum wages or overtime compensation. A separate section defined "employer" but expressly exempted the United States and states. The definition was amended in 1966 to provide an exception to the exemption for state employees employed in a hospital, institution or school. This Court found insufficient basis in the amendment or its legislative history to indicate a congressional intent to abrogate state immunity. Importantly, this Court reasoned that Congress would have amended the liability section of the FLSA had it intended to abrogate state immunity and subject states to double damages. *Employees*, 411 U.S. at 285. CERCLA, in contrast to the FLSA, contains definition and liability sections that were enacted together, not 28 years apart, and a private party may not recover punitive damages.

The *Employees* decision is distinguishable for other reasons too. The FLSA had a considerable history of state immunity and the general grant of immunity was retained in the definitional section even after the 1966 amendment. By contrast with the FLSA, neither CERCLA or its legislative history intimates state immunity. In *Employees*, this Court observed that since the United States was authorized to bring suit on state workers' behalf, the workers' rights would be protected under the FLSA. Under CERCLA there is no federal protection for a private party seeking recoupment of cleanup costs against a state if the Third Circuit's decision stands. Finally, under the FLSA states play no role in the statutory scheme whereas state participation is intrinsic to CERCLA's statutory scheme.

In summary, this case raises a basic question concerning the nature of legislative statement in the Eleventh Amendment context; can Congress' words be taken at face value, or must there be some additional statement in the statute or the legislative history confirming congressional intent? As the dissent points

out, the approach taken by the court below makes legislative action problematical:

> As judges, we must never forget the complexity and the time constraints of the federal legislative process. Legislators do not have the time or the capacity to anticipate every possible argument that might be made subsequently by creative and clever counsel. They need not thwart every potential argument in the womb of time by writing volumes of legislative history which say no more than the legislature meant what they said in the statute.

(App. at A-29). The diverse standards spawned by *Atascadero* and *Hutto* have already been described. This is not an area of the law that can tolerate such diversity. Congress needs to know precisely what it must say when it wishes to abrogate the states' immunity. This case provides an ideal vehicle for illuminating the requirements of clear statement in the Eleventh Amendment context.

Finally, petitioner submits that the rule of *Hans v. Louisiana*, 134 U.S. 1 (1980), which extends the Eleventh Amendment to federal question cases, should be reconsidered and overruled. The Eleventh Amendment was intended to give states immunity only in federal suits founded on diversity jurisdiction. *Atascadero, supra.* (J. Brennan, dissenting). By extending Eleventh Amendment immunity beyond its literal meaning, this Court has unconstitutionally circumscribed its jurisdiction over states in federal question cases.

## II
## The Lower Court's Decision Undermines The Purpose And Effectiveness Of An Important Environmental Statute

At the same time that it poses a question of central importance in Eleventh Amendment jurisprudence, this case has broad practical implications for the administration of CERCLA and for the nation's environmental program. States are involved in many of the identified pollution sites around the country. States own substantial amounts of property including waste and

disposal sites, and are generators and disposers of substantial quantities of wastes. States and local governments have for decades played a major role in managing the disposal of hazardous substances and, thus, states have often been the operators or owners of such sites. Congress was well aware of this. See, e.g., 42 U.S.C. §9604(c)(3) (special contribution rule for state owned sites).

Some of these sites are infamous. For example, California owns the Stringfellow site in Glen Avon Heights, California, which covers a 22 acre area where an estimated 34 million gallons of liquid wastes were dumped into surface impoundments and have contaminated surface and groundwater runoff. Texas owns a 15 acre abandoned waste pit in Crosby, Texas in the San Jacinto River flood plain where over 33 million gallons of liquid industrial wastes were disposed. In Pennsylvania, a foul-smelling sulfurous black liquid discharging from an abandoned gas well is threatening use of the Presque Isle State Park, a major recreational area on Lake Erie. See EPA's National Priorities List, 51 Fed. Reg. 21099 (June 10, 1986).

In these and other similar situations in which state liability is likely to be identified in the future, the ruling of the court below threatens to disrupt a carefully crafted legislative scheme. Congress sought not only to require cleanup, but also to distribute the enormous costs of cleanup among all those responsible over the course of many decades. In a rare departure for federal legislation, it specifically addressed the problem of contribution liability and held all persons—including the federal government—liable for contribution to the person undertaking cleanup. The decision below, by disregarding Congress' clear definition of "person," creates a unique and anomalous exception from liability for states, thereby forcing all other parties to bear more than their fair shares.

Moreover, the decision below threatens to undermine a major objective of CERCLA—the encouragement of *voluntary* participation in the cleanup of pollution sites. The statute and its legislative history emphasize the need for voluntary cleanup. See, e.g., 42 U.S.C. §9612(a); H. Rep. No. 96-1016, Part I, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Ad

News 6119, 6120 (purpose of bill is to "induce such persons voluntarily to pursue appropriate environmental response actions"). However, the decision below creates a powerful disincentive to any cleanup efforts by private parties. Whenever a state is arguably responsible for some portion of the cleanup costs under the statute, a private party is much better off taking no action at all, in the hope that the United States will clean up the site and seek reimbursement from the State. In that way a private party will not be left, as petitioner was here, paying the state's share of cleanup costs. By the same token, states will have every incentive to resist participating in any voluntary cleanup in the hope that private parties will do the job and be unable to recoup any part of the cost from the state.

The Third Circuit's decision that states are immune from liability for cleanup costs creates a yawning gap in Congress' comprehensive plan to clean up this nation's waste sites by exempting the states from CERCLA liability. States can use the statute as a sword to recover cleanup costs as well as a shield against liability for their acts in causing the release of pollutants. States have filed suit to recover cleanup costs under Section 107 of CERCLA by virtue of their inclusion in the definition of "person" in CERCLA. See, e.g., *New York v. Shore Realty Corp.*,, 759 F.2d 1032 (2nd Cir. 1985). If a state chooses not to act to clean up or contribute to the cleanup of a pollution site, there is nothing a private party can do under the Third Circuit decision. Thus, the Third Circuit decision foils the statutory purpose of voluntary cleanup whenever a state is involved.

The question of state liability for cleanup costs will recur again and again because of the states' role as owners of contaminated sites and generators of waste. The Third Circuit's decision undermines the statutory purpose of this country's principal environmental law whose goal—as stated in the first word of its title—is to be comprehensive. Whatever may be inferred from the adumbrated legislative history of CERCLA, there is no evidence of congressional intent to leave cleanup of state owned pollution sites to the benevolence of the states or to make third parties responsible for cleaning up pollution caused by states.

## CONCLUSION

For all the foregoing reasons, petitioner respectfully urges this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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**Appendix A**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 85-1177

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UNITED STATES OF AMERICA,

v.

UNION GAS COMPANY,

v.

COMMONWEALTH OF PENNSYLVANIA
and THE BOROUGH OF STROUDSBURG

UNION GAS COMPANY,

*Appellant*

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On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civ. No. 83-2456)

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Argued January 7, 1986

Before: WEIS, HIGGINBOTHAM, BECKER,
*Circuit Judges*

(Filed JUNE 10, 1986)

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**OPINION OF THE COURT**

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BECKER, *Circuit Judge.*

This appeal presents a single question: whether the eleventh amendment bars defendant-third party plaintiff Union Gas Company from suing the state of Pennsylvania for monetary damages in an action arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), 42 U.S.C. § 9601 *et seq.* (1982). The district court held that the eleventh amendment was a bar to suit and dismissed Union Gas' claim against the state. We affirm.

## I. *THE FACTS*

The relevant facts can be summarized quite briefly. Predecessors of Union Gas Company owned and operated a carburetted water gas plant proximate to Brodhead Creek in Stroudsburg, Pennsylvania, between 1890 and 1948, after which the plant was dismantled. In 1953 and 1970, Union Gas sold part of its land near the creek to Pennsylvania Power and Light Company, which in turn granted easements over the land to the Borough of Stroudsburg. In 1955, due to flooding, the state and the borough, together with the Army Corps of Engineers, dug levees, erected dikes, narrowed and deepened the creek, and redirected its flow. In early 1980, the borough assigned its easements to the state.

On October 7, 1980, the state was excavating at the creek when it struck a large deposit of coal tar that began to seep into Brodhead Creek. Alerted to the coal tar seepage, the Environmental Protection Agency (EPA) asserted that the coal tar was a hazardous substance and ordered the site be cleaned up.[1] The state of Pennsylvania jointly with the federal government undertook, *inter alia*, to dredge the back channel of Brodhead Creek, install a slurry wall to prevent further coal tar seepage, and clean up the coal tar that had already seeped into the water. The federal government reimbursed the state for all its costs, expending approximately $720,000 in total.

## II. *INSTITUTION OF THIS SUIT*

The United States brought suit in the district court for the Eastern District of Pennsylvania against Union Gas under CERCLA §§ 104, 107 (42 U.S.C. §§ 9604, 9607) for recoupment of costs of $450,000

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1. Brodhead Creek thus had the dubious distinction of being the first Superfund site in the nation.

incurred in cleaning up the spill at Brodhead Creek.[2] The United States claimed that the coal tar had been deposited into the ground near Brodhead Creek by Union Gas and its predecessors, as a by-product of their carburetted water gas processing, and that Union Gas was consequently liable for the clean up costs. Union Gas answered the complaint, denying any liability, and filed a third-party complaint pursuant to Fed. R. Civ. P. 14, naming Pennsylvania and the Borough of Stroudsburg as third-party defendants. Union Gas alleged that the state and its political subdivision had "negligently caused, or contributed to, the discharge of coal tar into Brodhead Creek" by their recent excavation and earlier construction of dikes and levees, and therefore that they should pay for the clean up.

The state, believing that the eleventh amendment barred Union Gas' suit against it, responded with motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[3] The district court granted the state's motion. *United States v. Union Gas Co.*, 575 F. Supp. 949 (E.D. Pa. 1983). Shortly thereafter, the United States filed an amended complaint, virtually identical to its original complaint but with revised damage

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2. The United States also sought damages of $270,000 under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1321(b)(3) and (f)(2)(1982). Union Gas did not file a third-party claim with respect to these damages, however, and so they are irrelevant to this appeal.

3. Independent local political subdivisions are generally not entitled to immunity, although they may, in some circumstances, be considered arms of the state and thus derive the state's eleventh amendment immunity. *See Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 727 (5th Cir. 1982). Because Stroudsburg did not raise an eleventh amendment defense below, and did not appear on this appeal, we reach no decision as to whether the eleventh amendment immunity would extend to Stroudsburg.

figures alleging that the United States had spent $1,400,000 on the clean-up, of which $720,000 was collectible from Union Gas under CERCLA. Union Gas answered and filed an amended third-party claim against the state and borough. The state again moved to dismiss, and the court granted the state's motion "for the reasons set forth in [575 F. Supp. 949]."

Approximately five months after the court's dismissal of Union Gas' amended third-party claim, the court dismissed the federal government's action against Union Gas pursuant to Rule 23(b) of the Local Rules of Civil Procedure of the Eastern District of Pennsylvania on the understanding that the United States and Union Gas had reached a settlement. Union Gas then appealed, citing as error the district court's denial of its motion to join the state as a party.

The issue before us involves a question of law, and therefore our review is plenary.

## III. *ABROGATION OF ELEVENTH AMENDMENT IMMUNITY*

The eleventh amendment states that:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although not apparent on its face, the eleventh amendment has been interpreted as a grant of sovereign immunity to the states in federal court.[4] *Pennhurst State School & Hospital v.*

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4. The amendment does not speak about the amenability of states to suits in state court. When we speak in this opinion of "states' sovereign immunity," we refer only to their immunity from suit in federal court derived from the eleventh amendment.

*Halderman*, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Hans v. Louisiana*, 134 U.S. 1 (1890). *But see Green v. Mansour*, ___ U.S. ___, 106 S. Ct. 423, 431 (1985) (Brennan, J., dissenting) ("the Amendment was intended simply to remove federal court jurisdiction over suits against a State where the basis for jurisdiction was that the plaintiff was a citizen of another State or an alien"); *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142, 3156-78 (1985) (Brennan, J., dissenting) (detailing history of the amendment to support the same conclusion); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983) (same); Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61, 67-71 (1984). The immunity can be avoided in only two ways: (a) Congress can *abrogate* it by providing through statute for suits against states, or (b) states can *waive* their sovereign immunity and consent to be sued. We are concerned here only with whether CERCLA abrogated Pennsylvania's immunity.[5]

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5. Union Gas also claims that Pennsylvania waived its immunity, but this claim is patently without merit and the district court did not even consider it. *United States v. Union Gas*, *supra*, 575 F. Supp. at 950. Union Gas alleges that Pennsylvania consented to suit by (a) owning and operating a site where hazardous wastes were stored, and (b) participating with the federal government in the clean-up effort. Leaving aside the fact that Pennsylvania most likely did not know of the coal tar in the bed of Brodhead Creek and so cannot be said to have consented to anything by its purchases of property, Pennsylvania's purchase and clean-up efforts are not sufficiently emphatic to constitute a constructive waiver of its constitutional right. It would be unreasonable to infer from Pennsylvania's actions that it had waived one of its most important and longstanding constitutional rights. *Cf. Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional

The Supreme Court has noted the eleventh amendment's importance in maintaining the balance of power between state and federal interests. *See, e.g., Atascadero, supra*, 105 S. Ct. at 3147-48; *Pennhurst, supra*, 465 U.S. at 99. Because this balance is central to our system of federalism, the Court has been reluctant to infer abrogation of the eleventh amendment by a federal statute that could be otherwise interpreted. In *Pennhurst*, for example, the Court required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" 465 U.S. at 99 (*quoting Quern v. Jordan*, 440 U.S. 332, 342 (1979)). In the recent *Atascadero* case, the Court held that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 105 S. Ct. at 3148 (footnote

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rights, and we see no place for it here."); *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). *See generally* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 695 (1976) (suggesting that courts require a definitive action by states before finding waiver of sovereign immunity).

Moreover, there is a bootstrap quality to Union Gas' argument that merely by aiding in the clean-up effort Pennsylvania waived its immunity. Stripped to its essence, Union Gas is arguing that waiver is a condition precedent to participation in the clean-up. But because participation is expressly allowed by statute, 42 U.S.C. § 9604(d)(1), the imposition of the condition must be found in CERCLA itself. Thus, Union Gas' waiver argument depends upon its interpretation of CERCLA -- *i.e.*, it is an argument of abrogation, not waiver. As such the argument is superfluous, for if the abrogation argument works, then the waiver argument is irrelevant, and if the abrogation argument fails, then so does the waiver argument.

omitted). *See also Edelman v. Jordan*, 415 U.S. 651 (1974).

Even a statute whose natural reading would allow for suits against the state -- indeed a statute for which any other reading may be awkward -- may not suffice. The Court has insisted that the statute, when read literally, not merely allow suits against the state, but that it do so with such specificity that it is clear that Congress consciously and directly focused on the issue of state sovereign immunity and chose to abrogate it.[6] *Cf. Hutto v. Finney*, 437 U.S. 678, 706 (1978) (Powell, J., concurring in part and dissenting in part) ("The Court should be 'hesitant to presume congressional awareness' of Eleventh Amendment consequences of a statute that does not make express provision for monetary recovery against the States.") (*quoting SEC v. Sloan*, 436 U.S. 103, 121 (1978)).[7]

Two cases in particular illustrate the Court's insistence on overwhelming evidence of congressional intent. In *Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare*, 411 U.S. 279 (1972), employees of a state hospital sued for overtime pay that they claimed they were entitled to under the Fair Labor Standards Act (FLSA). One section of the FLSA gave employees whose employers were covered by the FLSA a right of action against the employers to enforce the FLSA's terms. Another section had recently been amended explicitly to include state hospitals in the class of employers regulated by the FLSA. Although these two sections appeared to allow for a suit against state governments in federal court,

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6. Because abrogation requires a showing of "plain intent" rather than merely "plain meaning," the dissent's focus on CERCLA's "plain meaning" misses the mark.

7. Justice Powell wrote for the majority in *Atascadero*, discussed *infra*.

the Court found no abrogation of the State's immunity because there was no evidence of congressional intent on the specific issue of sovereign immunity. *Id.* at 284-85. It was also significant, the Court noted, that there was a plausible interpretation of the amended section that did not require abrogation of the eleventh amendment, according to which the section empowered the Secretary of Labor to sue the state on the workers' behalf. *Id.* at 285-86.

The second illustrative case, *Atascadero, supra*, involved § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which conferred a right of action upon handicapped people who were discriminated against by "any recipient of federal assistance." A plaintiff sought damages from a state hospital that received federal financial assistance, but the Court held that the inclusive language of the Rehabilitation Act notwithstanding, the eleventh amendment barred the suit:

> The statute thus provides remedies for violations of § 504 by "*any* recipient of federal assistance." There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid. *A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.*

105 S. Ct. at 3149 (emphasis added) (footnote omitted).

One other case deserves special mention. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Supreme Court held that the Civil Rights Attorney's Fees Awards Act,

42 U.S.C. § 1988 (1982), abrogated the eleventh amendment, thus permitting successful claimants against the state to receive attorneys' fees, even though the relevant statutory language was quite general and referred to neither the eleventh amendment nor suits against states. The Court relied on several factors, most significantly § 1988's extensive legislative history. The Court observed that both the House and Senate Reports explicitly endorsed the payment of attorneys' fees by states,[8] *see Hutto*, 437 U.S. at 694, and that two attempts to amend the Act to immunize state and local governments from awards had been defeated. *Id.* The Court concluded that this evidence provided the requisite "formal indication of Congress[ional] intent to abrogate States' Eleventh Amendment immunity," *id.* at 697 n.27, and that it would be irresponsible to refuse to read § 1988 as an abrogation of immunity, *id.* at 694. The Court was further influenced by the fact that because § 1988 "primarily applies to laws passed specifically to restrain state action," allowing the eleventh amendment to bar § 1988 suits would rob § 1988 of much of its force. *Id.* at 693-94. Finally, the Court noted the special nature of attorney's fees as costs of litigation, and thus within the traditional power and discretion of the judiciary. *Id.* at 696, 697 n.27.

There is some question whether *Hutto* stands in the wake of *Atascadero's* explicit holding that

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8. The Senate Report said that "[i]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, . . . or from the State." S. Rep. No. 94-1011, p. 5 (1976) (footnotes omitted), [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913 (quoted in *Hutto*, 437 U.S. at 694). The House Report was even more direct: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." H.R.Rep. No. 94-1558, p. 7 n.14 (1976) (quoted in *Hutto*, 437 U.S. at 694).

"unmistakable language in the statute itself" is the *sine qua non* of abrogation. The *Atascadero* Court did not overturn *Hutto*, however, and so we believe that it retains its precedential value. *Hutto* demonstrates that although a court may interpret a statute to abrogate states' eleventh amendment immunity even in the absence of explicit statutory language to that effect, the evidence in favor of such an interpretation must be virtually overwhelming. This insistance on overwhelming evidence is only intensified by *Atascadero*.[9]

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9. In *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), the Supreme Court held that a state that ran a railroad for profit was liable to its employees under the Federal Employers' Liability Act although that act had no mention of the eleventh amendment and its legislative history was sparse. *Parden* would thus seem to imply a lesser standard of proof for abrogation than that required by *Hutto*, and Union Gas relies upon it. The reliance is misplaced, for *Parden* has been limited to instances in which the state is engaged in a for-profit enterprise. *See Employees*, *supra*, 411 U.S. at 285. Union Gas has not suggested that Pennsylvania was engaged in such an enterprise here, and therefore *Parden* would appear to be inapposite.

Moreover, as Professor Tribe noted in 1976, the philosophy underlying *Parden* shifted significantly in the years following it, making abrogation more difficult:

> In the decade between *Parden* and *Edelman* [*v. Jordan*, 415 U.S. 651 (1974)], the Supreme Court's stance on the eleventh amendment has significantly shifted. *Parden* would make states amenable to suit in federal court whenever they undertake an activity for which a private person could potentially be held liable under a valid federal law. The *Parden* majority thus posited no distinction between the states and other entities that might be regulated by federal legislation. *Employees* and *Edelman*, on the other hand, understand states to be distinguished from other entities by federalism considerations. For this reason, the amenability of states to suit must be specifically

This brief review provides the background for our consideration of whether CERCLA may be interpreted to abrogate the eleventh amendment.

## IV. *CERCLA AND THE ELEVENTH AMENDMENT*

CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (codified in 42 U.S.C. §§ 9601-15, 9631-36, 9641, 9651-53, 9654-56, 6911-11A, 6957, and various sections of titles 26, 33 and 49), was a bold effort to meet the threat to the public health and environment posed by inactive hazardous waste sites. *See* H.R. Rep. No. 1016, PT. I, 96th Cong., 2d Sess. (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 6119; S. Rep. No. 838, 96th Cong., 2d Sess. (1980).[10] We shall not canvass the full scope of that effort; we will instead review those provisions of CERCLA that are directly relevant to Union Gas' claim that CERCLA manifests Congress' intent to abrogate states' eleventh amendment immunity.

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addressed by federal legislation, and Congress must make its intention to treat states like private parties unmistakably clear. This policy of clear statement had been rejected by the *Parden* majority, but . . . eventually prevailed.

Tribe, *supra*, at 690-91 (footnotes omitted). *See also* Welch v. State Dept. of Highways & Pub. Trans., 780 F.2d 1268, 1270-73 (5th Cir. 1986) (*en banc*) (discussing developments in the jurisprudence since *Parden*). The years since Professor Tribe wrote have only confirmed and deepened the change in attitude that he identified.

10. The legislative history of CERCLA is exceedingly complicated because of the manner in which the bill was passed. Three bills in the Ninety-Sixth Congress contributed in some way to the legislation as finally enacted, H.R. 7020, 96th Cong., 2d Sess. (1980), H.R. 85, 96th Cong., 1st Sess. (1979), and S. 1480, 96th Cong., 1st Sess. (1979). The legislative history is untangled and analyzed in Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Env. L. 1 (1982).

A. *42 U.S.C. § 9607 and the Definition of "Person"*

CERCLA empowers the President, in coordination with the state or states in which there is a hazardous waste site emergency, to clean up the dangerous waste or take other steps necessary to prevent the danger from escalating. 42 U.S.C. § 9604. The liability section of CERCLA, 42 U.S.C. § 9607(a), allows those who have incurred clean up costs to sue "any person" who owned or operated the waste site for all costs incurred in the removal effort. The definitional section of the statute, 42 U.S.C. § 9601, defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, *State*, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added).

Union Gas argues that 42 U.S.C. §§ 9607(a) and 9601 jointly meet the clear statement requirement enunciated by the Supreme Court. The argument is straightforward: (1) § 9607(a) says that any person who owns or operates a hazardous waste site is liable for clean-up costs; (2) the state owns the land on Brodhead Creek where the hazardous waste is deposited; (3) § 9601 says that a state is a person for purposes of CERCLA; therefore, (4) the state is jointly liable for the costs of the clean-up.

Although this argument is not without force, we cannot accept it. The statutory arrangement in this case is almost identical to that in *Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare*, 411 U.S. 279 (1972). Here, as there, the suggestion that states might be sued is found in a provision separate from the one that creates the plaintiff's cause of action. The *Employees* Court found that arrangement insufficient to satisfy the burden of abrogation. Because there is no suggestion in

CERCLA's legislative history that the authors of these provisions intended them to make states liable for damages, *cf. Hutto v. Finney*, 437 U.S. 678 (1978), we are bound by *Employees* to find that the inclusion of "states" within the class of potential defendants is insufficient to abrogate Pennsylvania's immunity.[11]

We would reach the same conclusion without the guidance of *Employees*, for there is evidence in CERCLA itself that § 9607(a) was not intended to abrogate states' sovereign immunity. The United States is included in the definition of person in § 9601(21); therefore, if § 9607(a) were indeed an abrogation of states' sovereign immunity then that section would waive the United States' immunity as well. However, a separate CERCLA provision, § 9607(g) explicitly waives federal sovereign immunity.[12] This implies that § 9607(a) does not waive federal immunity, for otherwise § 9607(g) would be superfluous. *See* 2A Sutherland Stat. Const. § 46.06

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11. The dissent suggests that the "key distinction" between *Employees* and this case is that the inclusive language in the FLSA at issue in *Employees* was an amendment to the statute while there was no such "evolution" in CERCLA. Dissent Typescript at 6-7. A fair reading of *Employees* demonstrates, however, that it was not the fact that the statute had been amended that led the Court to its conclusion, but rather the absence of any clear indication of congressional intent to abrogate states' eleventh amendment immunity. *See Employees*, 411 U.S. at 283-85. There is no greater evidence of congressional intent in this case.

12. 42 U.S.C. § 9607(g) states:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.

(4th ed. 1984 rev.) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . ."). Since § 9607(a) treats states and the federal government identically -- and since abrogation of states' eleventh amendment immunity requires no less a showing of congressional intent than does waiver of federal sovereign immunity[13] -- it follows that § 9706(a) does not abrogate states' eleventh amendment immunity, either.

Even if not read as an abrogation of state sovereign immunity, § 9607(a) still performs a meaningful function, *cf. Hutto*, 437 U.S. at 693-94, because it establishes a right of action *by the United States* against any states that own or operate hazardous waste sites. Suits by the United States against states are not foreclosed by the eleventh amendment, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965), but without § 9607(a) the United States would not be able to sue the states under CERCLA's generous terms.[14]

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13. Arguably, abrogation of states' eleventh amendment immunity would require a greater showing of congressional intent than does waiver of federal sovereign immunity. The difference in the burdens of proof would arise from the fact that federal sovereign immunity, unlike states' eleventh amendment immunity, arises from the common law not the Constitution. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) (tracing origins of doctrine in old English cases). We might therefore require greater specificity for the abrogation of state sovereign immunity than for the waiver of federal immunity. However, as that particular question is not before us here, the observations in this footnote are not part of our holding.

14. Most significantly, CERCLA allows for full recoupment of clean-up costs and strict liability. 42 U.S.C. §§ 9607(a),(c). If the United States could not sue states under CERCLA, it might be left sue each state under its own tort law.

Since the United States does most of the initial clean-up and then sues for reimbursement, our reading leaves § 9607(a) with substantial importance.

B. *Section 9607(e)(2) and Subrogation Rights*

Section 9607(e)(2) states that "[n]othing in this subchapter . . . shall bar a cause of action that . . . any . . . person subject to liability under this section . . . has or would have, by reason of subrogation." Union Gas argues that this section allows it to subrogate to the rights of the United States against Pennsylvania once the United States settled its case against Union Gas. Since the United States could sue Pennsylvania, *see supra* Part IV.A, Union Gas argues, so should Union Gas be able to do so, through the device of subrogation.

Section 9607(e)(2) simply cannot bear the burden it must to abrogate the states' eleventh amendment sovereign immunity. That section does not even mention the eleventh amendment or suits against states. There is no evidence in the legislative history of § 9607(e)(2) that Congress intended private parties to inherit all of the rights of the United States including the right to override the states' right not to be sued by private citizens in federal court, and we cannot ascribe such an intention to Congress.[15] Once again, if our refusal to read § 9607(e)(2) as an abrogation provision rendered that section meaningless or contradictory, we would have to reconsider our position. But our holding that § 9607(e)(2) does not allow private parties to sue

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15. Union Gas cites only one case to support the proposition that a party that subrogates to the rights of the United States inherits the right to sue states. Prairie State National Bank v. United States, 164 U.S. 227 (1896). That case did not contain any constitutional issues, let alone the particular issue of eleventh amendment sovereign immunity. No state was even a party in that case.

states leaves it open for private parties to sue other private parties or the United States in the appropriate circumstances. Thus, under our reading, § 9607(e)(2) retains a significant role.

C. *CERCLA's Broad Policy*

CERCLA was intended "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with . . . hazardous waste disposal sites." H.R. Rep. No. 1016, 96th Cong., 2d Sess. 22, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 6119, 6125. Fastening on the word "comprehensive" in this passage and on similar expressions elsewhere of Congress' resolve to deal with hazardous waste sites with one fell swoop, *see, e.g.*, S. Rep. No. 848, 96th Cong., 1st Sess. 12 (1980) (bill "is designed to help address many of the problems faced by society as a result of chemical contamination."), Union Gas argues that Congress must have intended to abrogate states' immunity or else CERCLA would be less than "comprehensive" and all-encompassing. The inevitable conclusion, the argument runs, is that CERCLA must be an abrogation of states' eleventh amendment immunity.

While the previous two arguments relied on the language of CERCLA itself, this one relies exclusively on CERCLA's legislative history. It therefore faces a particularly heavy burden that it is unable to bear. Not only is there nowhere near the overwhelming evidence relied upon by the Supreme Court in *Hutto v. Finney*, 437 U.S. at 694, but there is simply no indication *anywhere* in CERCLA's legislative history that Congress considered abrogating the eleventh amendment or even contemplated CERCLA suits against states.[16] The declaration that a bill will deal

16. The issue of states' immunity was never squarely addressed by either house of Congress in the CERCLA debates. The

"comprehensively" with a problem is commonplace and may be little more than political hyperbole; at all events, it does not rise to the level necessary to deprive states of their constitutional rights. The legislative history falls far short of providing a "formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity." *id.* at 697 n.27, and Union Gas' argument from legislative history thus fails.

D. *A Comparison of CERCLA with other Environmental Statutes*

CERCLA was not the first congressional effort to deal with environmental problems by creating causes of action against polluters. The Clean Air Act, the Resource Conservation and Recovery Act (RCRA), and the Federal Water Pollution Control Act all authorize citizens' suits against polluters. In each case, the legislation specifically provides that any citizen may sue violators of the relevant statute to enforce the terms of the act and that if the violators are states they may be sued "to the extent permitted by the Eleventh Amendment to the Constitution." *See* 42 U.S.C. § 7604 (1982) (Clean Air Act); 42 U.S.C. § 6972 (1982) (RCRA); 33 U.S.C. § 1365 (1982) (Federal Water Pollution Control Act).

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eleventh amendment was mentioned not once in any document or discussion pertaining to CERCLA. It can be argued that the Senate debates suggest that to the extent there was any consideration of the matter of sovereign immunity, it was thought that states would retain their immunity. Senator Randolph, for example, stated that the purpose of CERCLA liability provisions was to "provide that the funds be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society." 126 Cong. Rec. 30932 (Nov. 24, 1980). This statement would appear not to include states. However, this argument is not necessary to our conclusion, and we note it only in the interests of completeness.

Because CERCLA does not have an analogous provision for citizens' suits,[17] § 6907, which limits standing to those who have incurred response or remedial expenses in cleaning up releases of hazardous substances, is the closest analogy in CERCLA to the citizens' suit provisions of the other statutes. Union Gas points out that unlike those provisions in the other statutes, CERCLA does not have an explicit eleventh amendment limitation and concludes that the absence of such a limitation in CERCLA is sufficient evidence that Congress intended CERCLA to abrogate the eleventh amendment.

Our answer, by now familiar, but no less applicable or correct, is that this evidence is simply insufficient to overturn the states' constitutional right to immunity. In the first place, the citizen suit provisions in the other three statutes are fundamentally different from § 9607, for whereas those provisions permit only injunctive relief to enforce the terms of each statute, § 9607 permits recoupment of clean-up expenses, an action for damages. Thus, the analogy is inexact. More fundamentally, even if the citizen suit provisions allowed for damage remedies as does § 9607, we do not believe that the comparison between the statutes would constitute a showing of congressional intent sufficient to abrogate eleventh amendment immunity. None of the Supreme Court cases cited above, nor any other case of which we are aware in any court, has read a statute to abrogate eleventh amendment immunity on the basis of what the statute did *not* say. Congressional silence, except in the rarest of cases, is not unequivocal evidence of congressional intent. To interpret congressional silence as express abrogation, therefore, would be improper. *See Employees, supra*.

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17. There are bills currently in Congress that would amend CERCLA to allow for citizen suits. The bills are discussed *infra* at pp. 21-22.

411 U.S. at 285 ("It is not easy to infer that Congress . . . desired silently to deprive the States of an immunity they have long enjoyed . . . .").

Our position is unchanged by recently proposed amendments to CERCLA that would provide for citizen suits. Both the House and the Senate have passed bills amending CERCLA in various respects. *See* H.R. 2817, 99th Cong., 1st Sess. (1985) (House Bill); H.R. 2005 (Senate Bill). The bills are scheduled for joint conference, and are not yet law. Among the amendments are ones analogous to the citizen suit provisions in the Clean Air Act, Federal Water Pollution Act, and RCRA, that allow citizens to bring suits against any violators of CERCLA, or against the President, to enforce compliance with CERCLA. Like those other provisions, the proposed CERCLA citizen suit provision would permit suits against states "to the extent permitted by the Eleventh Amendment." See H.R. 2817 § 150; H.R. 2005 § 310. Union Gas argues that the facts that the proposed amendments would include the eleventh amendment limitation and that § 9607 does not include it imply that § 9607 was intended to abrogate the eleventh amendment.[18]

Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in judicial statutory interpretation. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 380-381 (1969). There is no evidence, however, to support Union Gas' contention that the proposed amendments are a response to the terms or perceived meaning of § 9607. Union Gas points to no legislative history of the proposed

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18. Union Gas explains: "[I]f [the proposed amendments] were to become law, it would suggest that Congress had abrogated and intended to continue the abrogation of states' Eleventh Amendment immunity as to [42 U.S.C. § 9607] suits brought by parties that have paid clean-up costs, but not as to the new categories of citizen suits."

amendments that suggests that the Congress considering the amendments thought that § 9607 abrogated the eleventh amendment and made a conscious decision to distinguish the amendments by limiting the scope of the citizens' suits. Our independent review of the legislative history has also turned up no evidence that the proposed amendments reflect the current Congress' judgment about the scope and meaning of § 9607. Without any such evidence, the amendments cannot withstand the burden of proof that abrogation demands.[19]

## V. *CONCLUSION*

We hold that CERCLA does not evidence congressional intent to abrogate states' eleventh amendment immunity. The judgment of the district court will be affirmed.

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19. There is a perfectly reasonable explanation for the eleventh amendment limitations in the proposed citizen suit provisions according to which those limitations are not a response to the scope of § 9607: it may be simply that the proposed CERCLA citizen suit provisions were modeled after the analogous provisions in the other environmental statutes, without regard to § 9607.

    On account of the lack of evidence that the proposed amendments are a response to the current Congress' understanding of § 9607, we do not have to decide how much weight we would give the amendments if they were in fact motivated by a current legislative interpretation of § 9607. Because the proposed amendments are not yet, and may never be, law, the amendments deserve less weight than they would otherwise. *Cf.* Southeastern Community College v. Davis, 442 U.S. 397, 411 n.11 (1979) (statements of legislators or congressional committees after the enactment of a law are not entitled to the same interpretive weight as subsequent legislation).

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

When a statute in its definitional section declares unequivocally that the term "person" includes a "*State*, municipality, commission, political subdivision of a *State*, or any interstate body" 42 U.S.C. § 9601(21) (emphasis added), the explicit language of Congress should not be disregarded where there is no legislative history suggesting that Congress did not mean what they said when they used the word "state." Instead of giving Congress the presumption that they know what a state is, the majority seems to assume that judges have a better mastery and understanding of the English language than does Congress, and thus they roam through inconclusive legislative history to "demonstrate" that Congress did not mean state when they included that specific phrase in the key definitional section of the statute. In the future, to comply with the rationale of the majority, in definitional sections of similar statutes where remedies are provided for damages citizens or corporations have suffered, Congress must use language similar to the following: "The term person includes a state, and we really mean the state, and furthermore the eleventh amendment's prohibition on suits against the states does not apply." In matters of statutory construction of legislation that is as explicit as the statute in issue, no other court has imposed as broad a reading of eleventh amendment prohibitions. I respectfully dissent.

I.

The liability section of Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607, provides that ". . . *any person* who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

. . . *shall be liable for . . . any other necessary costs of response incurred by any other person* consistent with the national contingency plan. . . ." 42 U.S.C. § 9607(a)(2)(B) (emphasis added). The definitional section of the statute, 42 U.S.C. § 9601, defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, *State*, municipality, commission, political subdivision of a *State*, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added). Inasmuch as the plain language of 42 U.S.C. §§ 9607(a)(2)(B) and 9601(21), when read jointly, declares that a state is a person for liability purposes pursuant to CERCLA, it follows then that "states" are within the class of potential defendants liable for the costs of the clean-up. The statutory language points unambiguously to a conclusion contrary to that reached by the majority. To reach the conclusion that the word state means state one need not resort to inferences or *a fortiori* reasoning. One need not fill in what Justice Cardozo calls the "interstitial gaps" of legislation. Nor are we confronted with the problem that Gray so eloquently described in his *Nature and Sources of the Law*:

> The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all: when the question which is raised on the statute never occurred to it: when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

J. C. Gray, *Nature and Sources of the Law*, § 370 at 165, *quoted in*, B. Cardozo, *The Nature of the Judicial Process* 15 (1975).

II.

The basic issue is whether the definitional section is sufficiently adequate in itself to find legislative intent to abrogate sovereign immunity. I think it is. When interpreting a statute, the starting point is of course the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). If the language is clear and unambiguous, and there is no "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*; *see also Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983) (same).

In the instant case, there is *no* legislative history indicating that Congress considered or debated the issue of states' eleventh amendment immunity. From my view, the absence of a debate on this issue merely indicates that Congress was smart enough to know what a state is and therefore, when including states as persons who could be liable under CERCLA, Congress realized the eleventh amendment implications.

Because there is no legislative evidence as to whether Congress intended states to be inclusive or exclusive of CERCLA's liability provision, 42 U.S.C. § 9607, the language of the definitional section, 42 U.S.C. § 9602(21), is controlling and should be regarded as authoritative evidence of congressional intent to abrogate states' sovereign immunity. It would seem, therefore, from the clear words of the statute ("person means . . . state, . . ."), that the majority should have reached a different result. Instead, the majority held that "we are bound by [*Employees v. Missouri Dept. of Pub. Health & Welfare*, 411 U.S. 279 (1973)] to find that the inclusion of 'states' within the class of potential defendants is insufficient to abrogate

Pennsylvania's immunity."[1] Maj. Typescript at 14. I submit that, since *Employees*, *supra*, is patently distinguishable from the case at bar, we are not "bound" to decide this case in favor of states' immunity.

In *Employees*, the employees of state health facilities brought suit against the state in federal court, seeking overtime compensation due them under the Fair Labor Standards Act ("FLSA") of 1938. The question was whether the employees could sue their

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1. The majority also holds that "[w]e would reach the same conclusion without the guidance of *Employees*, for there is evidence in CERCLA itself that § 9607(a) was not intended to abrogate states' sovereign immunity." Maj. Typescript at 15. The majority relies on a separate CERCLA provision, § 9607(g), that explicitly waives federal sovereign immunity. The majority suggests that because § 9607(g) waives federal sovereign immunity, § 9607(a) does not waive federal sovereign immunity; hence, since § 9607(a) treats states and the federal government identically, § 9607(a) does not abrogate states' eleventh amendment immunity either. *Id.* at 15-16.

The majority cites no legislative history to support the weight they give to § 9607(g). At most, Congress was merely being redundant by their inclusion of a waiver of federal sovereign immunity. The redundancy is not the equivalent of demonstrating a congressional intent not to abrogate states' eleventh amendment immunity. The majority's conclusion is contrary to the familiar canon of statutory construction. Because there is no legislative history as to Congress' considering the specific problem of sovereign immunity, the court must rely on the plain language of CERCLA. The language of CERCLA contains a clear indication that Congress intended to allow private citizens to bring suits against states. In view of such clear statutory language, it does not follow that because Congress provided a specific provision abrogating federal government's immunity, Congress' failure to do the same where states are concerned evidenced a conclusive congressional intent not to lift states' sovereign immunity.

state employer in federal court under FLSA. The liability section of FLSA provided in relevant part:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . .

Section 16(b) of FLSA, 52 Stat. 1069, 29 U.S.C. § 216(b) (1938). The definitional section of FLSA read in relevant part:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee *but shall not include the United States or any State or political subdivision of a State*, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 3(d) of FLSA, 52 Stat. 1060, 29 U.S.C. § 203(d) (1938) (emphasis added). In 1966, § 3(d) was amended by expanding the definition of employer to include a state or a political subdivision with respect to employees "(1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section. . . . " Pub. L. 89-601, § 102(b), 80 Stat. 831 (1966). In view of the 1966 amendment, FLSA seemingly subjected states to suit along with other employers. However, since the language in § 16(b) had not been changed in 1966, the court in *Employees* concluded that it should not infer that Congress had removed states' immunity from suit without amending

§ 16(b). The court in *Employees* said "[i]t would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old section 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away." *Employees*, 411 U.S. at 285.

The key distinction between FLSA and CERCLA is that within the evolution of FLSA amendments there were two statutory provisions that caused an ambiguity as to the intent of Congress. In *Employees*, prior to 1966, there was clear statutory language indicating a congressional intent not to abrogate states' eleventh amendment immunity. But, the subsequent 1966 amendment made the earlier statutory language unclear: as to its applicability - the amended section 29 U.S.C. § 203(d) (1966) made states subject to suit under FLSA while the liability section, 29 U.S.C. § 216(b), remained the same. Read together, these sections could be rationally construed to either deny or allow states to be subjected to suit by state employees. Thus, the evolutionary language within FLSA spawned ambiguity.

In contrast, in this case, we are not confronted with a statute which at one time declared that a person "shall not include the United States or any State or political subdivision of a State." But to the contrary, here, we have the original statute, never amended for purposes relevant to this case, that has always declared that the state was a person for liability purposes. In view of the familiar canon of statutory construction, the language of FLSA, unlike the language of CERCLA, was not authoritative evidence of clear legislative intent. *Cf. Dickerson*, 460 U.S. at 110 (the general rule of statutory construction is to look first to the language of the statute and then to the legislative history if the statute is unclear).

The majority also relies on *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142 (1985) in holding that CERCLA does not abrogate the eleventh amendment bar to suits against the states. *Atascadero, supra*, involved § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which conferred a right of action upon handicapped people who were discriminated against by "any recipient of federal assistance." In *Atascadero*, a plaintiff sought damages from a state hospital that received federal financial assistance. The *Atascadero* court, noting that Congress must express its intention to abrogate the eleventh amendment in unmistakable language in the statute itself, held that the "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the eleventh amendment." *Atascadero*, 105 S. Ct. at 3147-49.

The case at bar is distinguishable from *Atascadero, supra*. The statute in *Atascadero* provides remedies for violations of § 504 by "*any recipient* of federal assistance" (emphasis added). However, there was no specific statutory language identifying the class of recipients of federal aid, as in CERCLA, as "State, municipality, commission, political subdivision of a State, or any interstate body." Thus, the statute in *Atascadero* placed liability on a general class of potential defendants.

In the instant case, CERCLA provides that *any person* who owns or operates any facility at which hazardous waste is deposited is liable for the costs of the clean-up (emphasis added). In addition to the foregoing general liability provision, CERCLA further provides a specific provision identifying the class of potential defendants, *i.e.*, person means state. *See* 42 U.S.C. § 9601(21). Unlike the statute in *Atascadero*, the statute in the case at bar does more than place

liability on a general class of potential defendants. CERCLA allows states to be subjected to suit by private persons, in "unmistakable language in the statute itself."

In the case at bar, I find no ambiguity in the language of CERCLA and no contrary legislative intent. The majority, therefore, had no occasion to "look beyond the plain language of the federal statute . . . ." *Thorn v. Reliance Van Co., Inc.*, 736 F.2d 929, 932 (3d Cir. 1984), *quoting, Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 12 (1983). Accordingly, the definitional section of CERCLA, 42 U.S.C. § 9601(21), is controlling. CERCLA was passed with clear congressional intent, evidenced by its unambiguous statutory language, to abrogate states' eleventh amendment immunity.

III.

As judges, we must never forget the complexity and the time constraints of the federal legislative process. Legislators do not have the time or the capacity to anticipate every possible argument that might be made subsequently by creative and clever counsel. They need not thwart every potential argument in the womb of time by writing volumes of legislative history which say no more than that the legislature meant what they said in the statute. As Justice Cardozo once observed "[w]e do not pick our rules of law full-blossomed from the trees." B. Cardozo, *supra* at 103. In this case, there was a bloom of sufficient specificity for the problems with which Congress was dealing. It is particularly ironic that private parties will now be denied the right to collect millions of dollars in damages[2] for which they

---

2. The amended complaint with revised damage estimates alleges that the United States has spent $1,400,000 on the clean up, of which $720,000 was collectible from Union Gas under CERCLA. It is the theory of Union Gas that much of

should be reimbursed because the state was the party that improperly "disposed" of hazardous substances to the land and waterways of our Nation. Such a result is absurd and patently unfair when it is based on the assumption that Congress did not really mean "states" although it unambiguously included states as persons liable for the harm they cause in disposing of hazardous substances.

To return to Justice Cardozo, he so wisely observed that:

> [i]n countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.

*Id.* at 129. In this case, from my view the majority has failed to look at the landscape and appreciate the clear statutory language of Congress. I would reverse and remand this case to the district court for further proceedings.

---

the damage was caused by the state. Union Gas alleges that the state:

> . . . caused the alleged release and discharge of coal tar and oil into Brodhead Creek by their acts, omissions and/or negligence including, *inter alia*:
>
> (a) The narrowing of the channel of Brodhead Creek on its western side and restriction of the channel with dikes thereby causing significant downcutting;
>
> (b) Excavating along the toe of the dike and backwater areas;
>
> (c) Failing to take corrective measures to prevent the downcutting.

Appendix ¶12 at 106a-107a.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

**Appendix B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 85-1177

---

UNITED STATES OF AMERICA

v.

UNION GAS COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
and THE BOROUGH OF STROUDSBURG

UNION GAS COMPANY,

*Appellant*

(D.C. Civ. No. 83-2456)

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On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

Present: WEIS, HIGGINBOTHAM and BECKER,
*Circuit Judges*

## JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 7, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 4, 1985, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

Clerk

June 10, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| UNION GAS COMPANY | : | NO. 83-2456 |

**ORDER**

AND NOW, TO WIT, this 28th day of October, 1983, IT IS ORDERED that the motion of third-party defendant, Commonwealth of Pennsylvania, to dismiss the third-party complaint as to it is *granted* and all claims against the Commonwealth of Pennsylvania are *dismissed*. The Court's Opinion will be filed in due course.

LOUIS C. BECHTLE, J.

## Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| UNION GAS COMPANY | : | NO. 83-2456 |

**MEMORANDUM**

BECHTLE, J. NOVEMBER 15, 1983

The United States of America has brought suit against the Union Gas Company ("Union Gas") under sections 104 and 107 of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "the Act"), 42 U.S.C. §9604 and 9607, and section 311(b)(3) and 311(f)(2) of the Clean Water Act, 33 U.S.C. §1321(b)(3) and 1321(f)(2), for reimbursement of costs of removal and remedial action incurred in the clean-up of hazardous substances, released from a facility allegedly owned and operated by Union Gas, into Brodhead Creek in Stroudsburg, Pennsylvania. Union Gas has filed a third party complaint under CERCLA against the Commonwealth of Pennsylvania and the Borough of Stroudsburg, alleging that the third party defendants are owners and operators of the facility in question and are therefore responsible for the release of any hazardous substances into Brodhead Creek. Presently before the court is the Commonwealth of Pennsylvania's motion to dismiss the third party complaint on the ground that jurisdiction over it is barred by the Eleventh Amendment to the United States Constitution. As set out below, the court agrees that the Eleventh Amendment bars this suit insofar as the Commonwealth is concerned. Therefore, its motion to dismiss shall be granted.

The Eleventh Amendment to the federal Constitution embodies the doctrine of state sovereign immunity. It provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

Accordingly, suits against a state by citizens from either another state or a foreign state are barred. Additionally, although the amendment does not expressly address suits against a state by its own citizens, the Supreme Court has recognized that such suits are also barred. *Edelman v. Jordan*, 415 U.S. 651, 653 (1974) (citations omitted).

Exceptions to the states' Eleventh Amendment sovereign immunity exist in situations where either the state has consented to the filing of such a suit, *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), or Congress has abrogated the states' sovereign immunity by explicit statutory mandate. *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973). *See Quern v. Jordan*, 440 U.S. 332 (1974); *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Union Gas contends that it fits within the latter category. Union Gas claims that in enacting CERCLA, Congress effectively abrogated the states' immunity from suit by private citizens seeking indemnity for costs incurred in the clean-up of hazardous waste sites.

Union Gas's position must be considered in light of a line of Supreme Court cases, the holdings of which may be distilled into a rule which the court shall call the "clear statement rule." The principle embodied in the clear statement rule is that a state cannot be sued pursuant to the liability provisions of a federal law unless Congress provides a clear statement that it intended to abrogate the states' immunity with respect to that law. The origin of this rule may be traced to *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), wherein the Court faced, for the first time, a state's claim of immunity against suit by an individual upon a cause of action expressly created by Congress. The issue to be

decided was whether a state that owned and operated a railroad in interstate commerce could successfully plead sovereign immunity in a federal suit brought against the railroad by its employee under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, *et seq.* The Court's analysis focused on the question of whether Congress, in enacting the FELA, intended to subject a state to suit under the circumstances presented. After reviewing the terms and purposes of the FELA, the Court concluded that indeed Congress had intended to allow states to be sued under the FELA's liability provisions. The case ultimately turned on the determination that the state, by engaging itself in the railroad business for profit, had entered into an area normally occupied by private persons and corporations. It had therefore consented to be subject to the federal regulations applicable to the railroad industry and had waived its sovereign immunity from a suit under the FELA.

The *Parden* decision was subsequently limited in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), a case filed against administrative departments of the State of Missouri by state employees seeking overtime compensation allegedly due them under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b). Despite express language in the Act that its coverage extended to certain state employees, the Court refused to find that Congress had lifted the sovereign immunity of the states "where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." *Id.* 411 U.S. at 287.[1] After reviewing the pertinent legislative history of the FLSA the Court concluded that if Congress intended to deprive the states of their constitutional immunity, it would not have done so silently. Since there was no "clear language" in either the statute itself or its legislative history which would indicate that the states' constitutional immunity was swept away, the Court ruled that the Eleventh Amendment

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1. The holding did not render the extension of coverage to state employees meaningless because §16(c) of the FLSA permits the Secretary of Labor to bring suit on behalf of state employees for unpaid wages.

barred the employees' suits against their state employer. 411 U.S. at 285.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court reversed the Seventh Circuit's holding that a state, by participating in a federal-state aid program governed by federal regulations, had "constructively consented" to a citizen's suit related to the state's administration of that program. The *Edelman* Court reiterated that in considering a claim of surrender of Eleventh Amendment immunity in the face of federal legislation, "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Id.* 415 U.S. at 673 (citations omitted).[2]

Congressional awareness and compliance with the Supreme Court decisions setting out the clear statement rule cannot be disputed. Congress has, through clear statutory language and legislative intent, enacted a number of laws effectively abrogating a state's immunity in federal court. *See e.g., Parks v. Pavkovic*, 536 F.Supp. 296, 309 (N.D. Ill. 1982) (Education for All Handicap Children Act of 1975 specifically intended to impose liability on states for certain education costs); *Oneida Indian Nation of Wisconsin v. State of New York*, 520 F.Supp. 1278, 1305 (N.D. N.Y. 1981) (intent to abrogate state immunity inferred from congressional intent, statutory language and special relationship between the Indian tribe and federal govern-

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2. Following Edelman, the decisions in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678 (1978); and Quern v. Jordan, 440 U.S. 332 (1979), have reaffirmed the principle that the "clear statement rule" is the appropriate guideline for examining claims that Congress has lifted Eleventh Amendment immunity through its enactment of particular legislation. Although these cases concern legislation passed pursuant to the Fourteenth Amendment, while the legislation at issue in Employees, Parden, and Edelman was passed pursuant to Article I, the distinction is not material insofar as the existence of the clear statement rule is concerned. *See* Fitzpatrick, *supra*, 427 U.S. at 452. Succinctly stated, the Fourteenth Amendment cases focus on whether §5 of the Fourteenth Amendment itself provides the clear statement by Congress necessary to allow abrogation of the Eleventh Amendment. Of course, such discussions assume that the clear statement rule is the starting point for the analysis.

ment); *modified on other grounds*, 691 F.2d 1070 (2d Cir. 1982); *Witter v. Pennsylvania Nat'l Guard*, 462 F.Supp. 299, 306 (E.D. Pa. 1978) (Vietnam Era Veterans Readjustment Act is an express authorization of federal suits against a state for back pay). Abrogation of immunity in these cases was premised on a finding that in enacting the particular legislation at issue, Congress clearly expressed its intent to allow states to be sued. *Compare Savage v. Commonwealth of Pennsylvania*, 475 F.Supp. 524, 529 (E.D. Pa. 1979) (Civil Rights Act of 1871 not intended by Congress to abrogate a state's immunity (citing *Quern v. Jordan*, 440 U.S. 332 (1979)); *Municipal Authority of Bloomsburg v. Dept. of Environmental Resources*, 496 F.Supp. 686, 689 (M.D. Pa. 1980) (Federal Water Pollution Control Act amendments did not abrogate the states' immunity); *Stubbs v. Kline*, 463 F.Supp. 110, 116 (W.D. Pa. 1978) (Rehabilitation Act of 1973 did not contain the requisite congressional intent to abrogate a state's Eleventh Amendment immunity).

Applying the clear statement rule to the facts of the present case indicates that allowance of the claim against the Commonwealth of Pennsylvania depends on a finding that Congress expressly intended to abrogate a state's sovereign immunity.[3] A review of the statutory provisions and legislative history of CERCLA, however, reveals that there is no clear statement of such an intent in CERCLA.

Turning to the actual statutory provisions themselves, the

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3. In applying the clear statement rule to the present case, it should initially be noted that the Supreme Court has not yet addressed whether a state can be specifically named as a defendant in a waiver of abrogation case, where the state is being sued under a federal statute, as opposed to a consent case, where the state is being sued under state law. Cf. Alabama v. Pugh, 438 U.S. 781 (1979); Ex parte Young, 209 U.S. 123 (1908). For purposes of deciding the present motion, however, this court will assume, without deciding, that a state may be specifically named as a defendant in a suit under a federal statute which abrogates the states' Eleventh Amendment immunity. Of course, a state may, on its own accord, waive its sovereign immunity. Parden v. Terminal R. Co., *supra*. The Third Circuit Court of Appeals has ruled, however, that while Pennsylvania has waived its sovereign immunity in state courts, it has not consented to suits filed in federal court. Skelan Bd. of Trustees of Bloomsburg, 669 F.2d 142, 147 (3d Cir. 1982), cert. denied, 103 S.Ct. 468 (1982).

court finds nothing to indicate that Congress intended to allow states to be sued by private citizens under CERCLA. Union Gas's assertion that Congress did intend to lift the states' sovereign immunity centers upon language in Section 9607 that any "person" responsible for illegal toxic waste dumping is liable to other "persons" for costs incurred in the clean-up operation.[4]

Section 9601(21) defines a person, for purposes of CERCLA, as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body."

Union Gas argues that, since a "person" includes a state

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4. Section 9607 provides that:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, *shall be liable for*—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

42 U.S.C. §9607 (emphasis added).

within the meaning of CERCLA, 42 U.S.C. §9601(21), a state would be liable to a private litigant under §9607. This court cannot agree. A similar argument concerning the Fair Labor Standards Act ("FLSA") was suggested by plaintiffs and rejected by the Court in *Employees v. Missouri Public Health Dept.*, *supra*, 411 U.S. 279. In *Employees*, the term "employers," within the meaning of FLSA, included state-run health institutions. The Supreme Court found, however, that despite this inclusion, there was no indication of a congressional purpose to permit a citizen to sue the state in federal court. 411 U.S. at 285. The Court refused to imply such a purpose merely because the statute defined "employers" so as to include a particular state-run institution. In view of *Employees*, Union Gas's argument as to the combined effect of Sections 9607 and 9601(21) of CERCLA must be rejected. Any congressional waiver in CERCLA of the states' Eleventh Amendment immunity from suit must therefore be found in the statute's legislative history.

A review of the legislative background of CERCLA, however, reveals nothing to support a finding that Congress clearly expressed an intent to abrogate a state's immunity from liability. Neither the House nor the Senate reports indicated an intent to include a governmental entity as a defendant in an action brought by a private party. The Senate debates, however, made numerous references to private companies potentially liable under CERCLA. During one of these debates, it was expressly stated that a specific purpose of the CERCLA or "Superfund" liability provisions is to "provide that the fund be financed largely by those *industries and consumers* who *profit* from products and services associated with the hazardous substances which impose risks on society." 126 Cong. Rec. S14963-64 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph) (emphasis added). The Senate debates further emphasized that "[i]ssues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. at S14964. This court reads this last statement to include the common law doctrine of sovereign immunity embodied in the Eleventh Amendment.

In sum, since neither the statutory provisions nor the legis-

lative history of CERCLA reveals the requisite clear statement by Congress, the inevitable conclusion to be drawn is that Congress did not intend to allow private citizens to file suit against a state under this statute. Accordingly, the Commonwealth of Pennsylvania's motion to dismiss shall be granted.

The court's Order was previously entered on October 28, 1983.

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LOUIS C. BECHTLE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| UNITED STATES OF AMERICA | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| UNION GAS COMPANY | : | |
| | : | |
| v. | : | |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA and THE BOROUGH OF STROUDSBURG | : | NO. 83-2456 |

**ORDER**

AND NOW, TO WIT, this 13th day of September, 1984, upon motion of the Commonwealth of Pennsylvania to dismiss, IT IS ORDERED that the motion is granted and the amended third-party complaint filed by the Union Gas Company is dismissed for the reasons set forth in this court's Memorandum dated November 15, 1983.

LOUIS C. BECHTLE, J.

**Appendix D**

SUPREME COURT OF THE UNITED STATES

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NO. A-146

---

UNION GAS COMPANY,

*Applicant*,

v.

PENNSYLVANIA, ET AL.

---

**ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

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UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 8, 1986.

/s/ WILLIAM J. BRENNAN, JR.

Associate Justice of the Supreme Court of the United States

Dated this 27th
day of August, 1986.

(2)

No. 86-597

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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UNION GAS COMPANY, PETITIONER

*v.*

COMMONWEALTH OF PENNSYLVANIA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

---

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## QUESTION PRESENTED

Whether the Eleventh Amendment of the United States Constitution bars a suit against a state pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*

## TABLE OF CONTENTS


Page

Interest of the United States ..... 1

Statement ..... 2

Argument ..... 4

Conclusion ..... 6


## TABLE OF AUTHORITIES


Constitution and statutes:

U.S. Const. Amend. XI ..... 3

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* ..... 1

§ 101(20), 42 U.S.C. 9601(20) .....

§ 101(20)(A), 42 U.S.C. 9601(20)(A) ..... 1

§ 101(20)(D), 42 U.S.C. 9601(20)(D) ..... 4

§ 104, 42 U.S.C. 9604 ..... 3

§ 107, 42 U.S.C. 9607 ..... 3, 5

Federal Water Pollution Control Act, 33 U.S.C. 1151 *et seq.* :

33 U.S.C. 1321(b)(3) ..... 1, 3

33 U.S.C. 1321(f)(2) ..... 2, 3

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (Oct. 17, 1986) .... 4

§ 4 ..... 4

Page

Constitution and statutes—Continued:

§ 113 ..... 5

§ 113(b) ..... 5

Miscellaneous:

H.R. Rep. 99-962, 99th Cong., 2d Sess. (1986) ..... 5

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-597

UNION GAS COMPANY, PETITIONER

*v.*

COMMONWEALTH OF PENNSYLVANIA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### INTEREST OF THE UNITED STATES

The United States commenced this lawsuit in the district court to recover its cleanup costs pursuant to the Comprehensive Environment Response, Compensation, and Liability Act of 1980 (CERCLA) and the Clean Water Act, 33 U.S.C. 1321(b)(3) and (f)(2), naming petitioner Union Gas Company as the sole defendant. Petitioner filed a third-party complaint naming respondent Commonwealth of Pennsylvania and the Borough of Stroudsburg as third-party defendants, alleging that they were owners and operators of a facility at the site within the meaning of CERCLA, 42 U.S.C. 9601(20)(A), and caused or contributed to the release of hazardous substances involved in this case. The litigation between petitioner and the United States was settled in the district court. Petitioner seeks review of the dismissal of its third-party complaint against the state in this Court.

Because Congress enacted CERCLA to secure the expeditious cleanup of the Nation's pollution sites and to secure voluntary compliance with cleanup objectives and, failing that, to authorize the United States Environmental Protection Agency (EPA) to accomplish the cleanup, the interest of the United States in the interpretation of CERCLA and its amendments is both clear and substantial. This case raises an important question regarding the administration of CERCLA—namely, whether a private person who has expended considerable sums to clean up a designated pollution site for which a state is partially responsible may secure contribution from the state under the liability provisions of CERCLA.

## STATEMENT

1. Between 1890 and 1948, certain predecessors of petitioner Union Gas Company owned and operated a carburetted water gas plant near Brodhead Creek in Stroudsburg, Pennsylvania, which produced coal gas as well as its by-product, coal tar. Sometime after 1948, the plant was dismantled. The company operating the plant changed ownership several times before being merged into Union Gas Company in 1978. In 1953 and 1970, petitioner's predecessors sold portions of the land near Brodhead Creek to Pennsylvania Power and Light Company, which, in turn, granted easements over the land to the Borough of Stroudsburg. Because of flooding in 1955, the Borough, the State of Pennsylvania, and the Army Corps of Engineers dug levees, constructed dikes, narrowed and deepened the creek, and redirected its flow. In early 1980, the Borough assigned its easements to the State. Pet. App. A3.

On October 7, 1980, the State, while it was excavating at the creek, struck a massive deposit of coal tar, which thereupon seeped into the creek. The EPA was alerted to the seepage; concluding that coal tar is a hazardous substance, the agency ordered that the site be cleaned up. The state and

the federal governments jointly undertook the cleanup: they dredged the back channel of the creek, installed a slurry wall to prevent additional coal tar seepage, and cleaned up the coal tar that had already seeped into the water. After reimbursing the State for all of its costs, the federal government expended approximately $720,000. Pet. App. A3.

2. On May 23, 1983, the United States brought suit in federal district court against petitioner under 42 U.S.C. 9604 and 9607 for recoupment of costs incurred in cleaning up the spill.[1] The United States asserted that the coal tar had been deposited into the ground near the creek by petitioner and its predecessors, as a result of their carburetted water gas processing. Consequently, the United States maintained that petitioner was liable for the cleanup costs. Petitioner answered the complaint, denying all liability, and filed a third-party complaint naming the State and the Borough as third-party defendants. It alleged that the State and Borough were owners and operators of a facility at the site, and that they had negligently caused, or contributed to, the discharge of coal tar into the creek as a result of their recent excavation and construction of dikes and levees. Petitioner alleged, therefore, that the State and the Borough were responsible for paying the cleanup costs. Pet. App. A3-A4.

The State moved to dismiss the third-party complaint, asserting that it was immune from suit under CERCLA by reason of the Eleventh Amendment to the United States Constitution. The district court granted the State's motion (Pet. App. A35). Thereafter, the United States filed an amended complaint, and petitioner filed an amended third-party complaint against the State and Borough, which the

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[1]The United States also sought recovery of its cleanup costs under the Federal Water Pollution Control Act, 33 U.S.C. 1321(b)(3) and (f)(2). Petitioner did not file a third-party claim with respect to this claim.

State again moved to dismiss. The district court granted the State's motion for the reasons set forth in its earlier opinion. Pet. App. A4-A5.

3. Some months later, a settlement was reached by the United States, petitioner and the Borough under which petitioner agreed to pay a major portion of the cleanup costs. As a result of this settlement, the district court dismissed the lawsuit. Petitioner thereupon appealed the district court's dismissal of the State as a defendant. Pet. App. A5.

On June 11, 1986, a divided court of appeals upheld the district court's dismissal, finding that neither CERCLA itself nor its legislative history demonstrated congressional intent to abrogate the State's immunity under the Eleventh Amendment (Pet. App. A1-A31). This petition was timely filed on October 8, 1986.[2]

4. On October 17, 1986, the President signed the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499.[3]

## ARGUMENT

The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (Oct. 17, 1986), amends the CERCLA definitions relating to liability. Paragraph 20 of Section 101 of CERCLA, defining "owner or operator," is amended by the addition of the following new paragraph:

> (D) The Term "owner or operator" does not include a unit of State or local government which acquired

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[2]On August 27, 1986, Justice Brennan extended the time for filing the petition to and including October 8, 1986 (Pet. App. A47).

[3]The Amendments became effective on the date of enactment. See Pub. L. No. 99-499, § 4.

> ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 [42 U.S.C. 9607].

In the joint explanatory statement of the Committee of Conference, it is noted that the Senate amendment proposes to modify Section 101(20) of CERCLA, the definition of "owner or operator," to exclude a state or local government which acquired title or possession involuntarily and as a result of its function as sovereign. The House amendment contains no such provision. The Conference substitute adopts the Senate provision with a modification providing that if the state or local government caused or contributed to the release or threatened release of a hazardous substance, then the state or local government entity is subject, both procedurally and substantively, to the provisions of CERCLA to the same extent as any nongovernmental entity, including liability under Section 107 and as is made clear in the Committee Report, contribution under Section 113 of the statute. H.R. Rep. 99-962, 99th Cong., 2d Sess. 185-186 (1986). In addition, Section 113 of CERCLA was amended expressly to provide for a federal cause of action for contribution. Section 113(b) of Pub. L. No. 99-499.

This new legislation, therefore, directly addresses the question of state immunity, and authorizes suits against states or local governments for liability or contribution

when such entities caused or contributed to the release or threatened release of a hazardous substance. Accordingly, this Court should vacate the judgment herein and remand this case to the court of appeals for consideration of the effect of the new legislation.

## CONCLUSION

The judgment should be vacated and this case remanded for reconsideration.

Respectfully submitted.

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No. 86-597

IN THE SUPREME COURT
OF THE UNITED STATES

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OCTOBER TERM, 1986

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UNION GAS COMPANY,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

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# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals properly concluded that inclusion of States among those amenable to suit under a federal statute does not itself amount to the clear expression of Congressional intent required to abrogate Eleventh Amendment immunity, particularly where the statute is enforceable against States by the United States.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED..... | i |
| TABLE OF CITATIONS..... | iii |
| STATEMENT..... | 1 |
| ARGUMENT..... | 3 |
| CONCLUSION..... | 9 |

## TABLE OF CITATIONS


| | Page(s) |
|---|---|
| Atascadero State Hospital v. Scanlon, No. 84-351 (June 28, 1985)..... | 3, 5, 6 |
| David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, No. 85-1469 (April 28, 1986)..... | 6 |
| Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1972)..... | 1, 2, 4 |
| Ex Parte State of New York, No. 1, 256 U.S. 490 (1921).... | 5 |
| Hans v. Louisiana, 134 U.S. 1 (1890)..... | 5, 6 |
| Hutto v. Finney, 437 U.S. 678 (1978)..... | 3 |

## TABLE OF CITATIONS


| Statutes: | Page(s) |
|---|---|
| Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq. (1982)..... | passim |
| Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 1003(a)(1)(1986)..... | 5 |
| Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §101(b), 100 Stat. 1613 (1986)..... | 7 |
| U.S. Constitution | |
| Eleventh Amendment..... | passim |
| Report | |
| H. Rep. No. 99-926 (1986)..... | 8 |

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1986

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No. 86-597

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UNION GAS COMPANY,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

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# RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT

This case began as an action by the United States against Union Gas Company to recover the costs of cleaning up coal tar which had seeped into a creek in Pennsylvania. Pet. App. A-3. Union Gas, in response to the United States' amended complaint, filed a third-party complaint against the Commonwealth of Pennsylvania, alleging that Pennsylvania was responsible for the seepage. Pet. App. A-4. The District Court concluded that the third-party claim was barred by the Eleventh Amendment because the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq. (1982), did not clearly abrogate of the States' immunity

from suit in federal court. Pet. App. A-37-A-45. Following a settlement between the United States and Union Gas, Union Gas appealed the dismissal of its third-party claim.

The Court of Appeals, examining this Court's Eleventh Amendment precedents, concluded that abrogation of the States' immunity must be reflected either in clear statutory language or other overwhelming evidence of Congressional intent. Pet. App. A-7-A-11. The Court found in CERCLA neither prerequisite for abrogation: the statutory language did not suggest abrogation and the legislative history was silent on the subject. Pet. App. A-13-A-14. In reaching its conclusions, the Court of Appeals noted the strong resemblance between CERCLA and the statute examined in Employees of Department of Public

Health and Welfare v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1972). Much like the statute at issue in Employees, CERCLA lacks any clear expression of an intention to eliminate States' immunity and the statute continues to have meaningful applications in spite of the existence of immunity. For these reasons, the Court of Appeals affirmed.

## ARGUMENT

1. a. Petitioner claims (Pet. 6), as it did below, that CERCLA is clear in providing for liability on the part of States to private parties. Arguing from this premise, petitioner then characterizes the decision below as requiring that Congress' intent to abrogate Eleventh Amendment immunity be manifested "by some further statement or . . . some additional legislative history." Pet. 6. This is a mischaracterization of the decision of the Court of Appeals.

In fact, the Third Circuit, adhering to the tests prescribed in Atascadero State Hospital v. Scanlon, No. 84-351 (June 28, 1985) and Hutto v. Finney, 437 U.S. 678 (1978), merely applied the rule that abrogation will be

found only if either the statute itself or its legislative history unmistakably reflect a Congressional intent to eliminate the States' immunity. The Court of Appeals simply concluded that the statute did not itself explicitly abrogate immunity and the legislative history was silent on the matter.[1]

In rejecting petitioner's arguments, the Court of Appeals was influenced by the strong similarities between CERCLA and the language of the Fair Labor Standards Act which was reviewed in Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare, 411

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[1]Because petitioner has merely repeated (Pet. 5-6) the statutory construction argument which it presented below, we rely on the discussion of the Court of Appeals (Pet. App. A-13-A-16) which properly disposes of the argument.

U.S. 279 (1972), and found by the Court not to abrogate immunity. Both statutes included States within their terms and yet neither expressly mentioned an intent to override Eleventh Amendment immunity in suits brought by private parties. As the Court of Appeals observed, in both cases the inclusion of States within the respective regulatory schemes was not rendered meaningless by a finding that immunity continued to exist since, in both cases, the United States had substantial regulatory authority which it could assert against the States. Pet. App. A-13-A-16; Employees, 411 U.S. at 285-286. This case is squarely within the rationale of Employees.[2]

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[2]Petitioner's weak attempt to distinguish Employees (Pet. 8) is unavailing. The decision in Employees did not

(FOOTNOTE CONTINUED ON NEXT PAGE)

The requirement that there be an unmistakable indication of Congressional intent to support abrogation of Eleventh Amendment protection reflects the importance of the States' immunity and the Court's unwillingness to relieve Congress of its obligation to consider the matter explicitly. Employees, 411 U.S. at 284-285. But at the same time, it is abundantly clear that all Congress

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(FOOTNOTE CONTINUED)

turn on the sequence of the statutory enactments, the history of State immunity, the particular role of the United States as protector of private parties or the degree of State participation in the regulatory scheme. Rather, the premise of the decision was the Court's unwillingness "to infer that Congress in legislating pursuant to the Commerce Clause. . . desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." Employees, 411 U.S. at 285. This principle controls here as well.

need do is plainly express its intent to override the immunity. Congress has done so recently in other statutes and it needs no further guidance from the Court on how to accomplish this simple task. See, e.g., Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, §1003(a)(1) (1986) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of [enumerated statutes].").

b. Petitioner's call for a reconsideration of Hans v. Louisiana, 134 U.S. 1 (1890), should be rejected. The Court has emphasized that the Eleventh Amendment is but an "exemplification" of the fundamental rule of sovereign immunity. Ex Parte State of New York No. 1, 256 U.S. 490, 497 (1921). Petitioner's contention (Pet. 9) that the

amendment grants immunity only in "suits founded on diversity jurisdiction" is contrary to the long-standing jurisprudence in this area. See Atascadero, slip op. at n.2. In fact, the Court recently has refused, in the face of a strong dissent, to reconsider the conclusion in Hans that the Eleventh Amendment applies to a suit brought by a citizen against his own State. Atascadero, slip op. at 9-10 n.3. Petitioner has presented no new reasons to support a contrary result.

2. Despite petitioner's suggestion (Pet. 7), there is no confusion over the proper standard for finding abrogation of Eleventh Amendment immunity. The case to which petitioner points, David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, No. 85-1469 (April 28, 1986), does no more than apply the rules

of Atascadero and Employees. The First Circuit simply concluded in that case that the combination of the statutory language of the Education for All Handicapped Children Act and the consequence that acceptance of the immunity claim would remove from the statute's operation the only entities regulated by it mandated a finding of abrogation. Neither circumstance is present here.

3. We expect petitioner to argue in reply that a recent amendment to CERCLA now makes it clear that Congress has removed Eleventh Amendment immunity in suits brought by private parties.[3] But the amendment is a far

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[3]The amendment is as follows:

STATE OR LOCAL GOVERNMENT LIMITATION -- Paragraph (20) section 101 of CERCLA

(FOOTNOTE CONTINUED ON NEXT PAGE)

cry from the clear expression of Congressional intent which is required to support abrogation. The amendment has the obvious purpose of requiring that

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(FOOTNOTE CONTINUED)

(defining "owner or operator") is amended as follows:

(1) Add the following new subparagraph at the end thereof:

"(D) The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the

(FOOTNOTE CONTINUED ON NEXT PAGE)

cleanup costs be recovered from the prior owner of a facility acquired involuntarily by a State or local government, unless the State or local government shares in the responsibility for the release. The conference committee's comments confirm that the new

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(FOOTNOTE CONTINUED)

> same manner and to the same extent, both procedurally and substantively as any nongovernmental entity, including liability under section 107.".
>
> (2) Amend clause (iii) of subparagraph (A) to read as follows: "(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §101(b), 100 Stat. 1613 (1986).

provision was aimed at insulating State and local governments from the statute's strict liability provisions where a State acquires a facility involuntarily, but that this exclusion from liability should not apply where the government in fact caused a hazardous release.[4] There is to be sure no mention of Eleventh Amendment immunity, nor any suggestion that this provision was designed to reverse in any way the decision of the Court of Appeals in this

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[4]According to petitioner's complaint, the Commonwealth relocated the subject creek at the request of the Army Corps of Engineers and eventually acquired an easement over the creek by conveyance. Court of Appeals Appendix at 106a. This not the sort of involuntary acquisition contemplated by the amendments to CERCLA.

case.[5] H.Rep. No. 99-926, P. 185-186 (1986).

As we noted earlier, Congress is well aware of the Eleventh Amendment and the settled manner for abrogating its protections. For whatever reason, Congress has not chosen to expose the States to unlimited liability under CERCLA. The Court should decline petitioner's invitation to close what only it sees as a "yawning gap" in the regulatory scheme. This is a job for Congress and that is where petitioner should direct its arguments.

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[5]The decision of the Court of Appeals was handed down on June 10, 1986 and the Superfund Amendments were not passed by Congress until October 8, 1986. Presumably, if Congress disagreed with the decision below, it would have included in the comprehensive revision of CERCLA some clear expression of its intent.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 86-597

# In the Supreme Court of the United States

OCTOBER TERM, 1986

UNION GAS COMPANY, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent

## PETITIONER'S REPLY BRIEF

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-597

UNION GAS COMPANY, Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, Respondent

## PETITIONER'S REPLY BRIEF

The question in this Eleventh Amendment case is whether Congress has clearly expressed its intent to impose liability on the states. After the decision of the Third Circuit and the filing of this petition, the statute at issue—the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)—was extensively revised. Superfund Amendments and Reauthorization of 1986, Pub. L. No. 99-499 (October 17, 1986).

The CERCLA Amendments make boldly clear the Congressional intent which only one Circuit Judge had perceived before: states are liable to the same extent as private individuals. The statutory definition of "owner or operator" now provides: "[A]ny state or local government which has caused or contributed to the release or threatened release of a hazardous substance . . . shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." CERCLA §101(20), 42 U.S.C. §9601(20) as amended (see

Cong. Rec. H.9033). The only exception provided by Congress is where states acquire property involuntarily.

Union Gas shares the views expressed by the United States as *amicus curiae*: "This new legislation . . . directly addresses the question of state immunity, and authorizes suits against states or local governments for liability or contribution when such entities caused or contributed to the release or threatened release of a hazardous substance." U.S. Br. at 5-6.

Respondent candidly acknowledges that the 1986 amendments exempt state and local governments from liability only for property acquired involuntarily, and that the exemption "should not apply where the government in fact caused a hazardous release." Resp. Br. Opp. at 13. Respondent further acknowledges that the suit brought by Union Gas is based on affirmative state acts—"not the sort of involuntary acquisition contemplated by the amendments to CERCLA." Resp. Br. Opp. at 13 n.4.

Respondent continues to defend the decision below on the grounds that the amended statute still does not refer to the Eleventh Amendment by name, an argument that falters in the face of other provisions enacted at the same time. For example, the 1986 CERCLA amendments add a new and separate provision allowing private citizen enforcement actions against states, but "only to the extent permitted by the Eleventh Amendment." Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §206(a)(1) (see Cong. Rec. H9060). No such limit appears in the Section 107 liability provision cited by the United States and relied upon by Union Gas in this action. At least in the context of this statutory scheme, then, the lack of a reference to the Eleventh Amendment confirms Congress' intent to impose liability on the states.

As Union Gas argued in its petition, the question of state liability under CERCLA requires a clear and uniform answer. That answer having been provided by Congress, plenary review by this Court is not necessary. In such circumstances, this Court's practice is to grant certiorari, vacate the judg-

ment, and remand the case for further consideration in light of the new law. *Bureau of Economic Analysis v. Long*, 454 U.S. 934 (remanding for "further consideration in light the Economic Recovery Tax Act of 1981").

Union Gas therefore joins the United States in urging that the judgment below be vacated and the case remanded for reconsideration in light of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499.

Respectfully submitted,

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